

REPORT

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Of the Arbitrators in reference to the claim preferred by the Province of Nova Scotia against the Government of the Dominion.

EXTRACT from a Report of the Committee of the Honourable the Privy Council, approved by His Excellency on the 19th July, 1900.

On a report dated 16th July, 1900, from the President of the Privy Council, stating that the government of the province of Nova Scotia have, from time to time, preferred a claim against the government of the Dominion for a refund with interest of moneys expended by the said provincial government upon that part of the Intercolonial Railway between New Glasgow and the Strait of Canso formerly known as the Eastern Extension Railway.

The Minister advises that it is desirable that such claims should be inquired into and adjusted, and to that end, that a reference should be made to arbitration, and for such purpose it has been agreed, subject to the approval of the Governor in Council, that a reference of the said claim be made to the following persons, as arbitrators, mutually agreed upon by the government of the Dominion and the government of the province, namely :—

The Honourable Sir George Burton, Knight, Toronto, late Chief Justice of Ontario.
Fletcher B. Wade, Esq., Q.C., of the city of Halifax.

Edmund J. Barbeau, Esq., of the city of Montreal, one of the directors of the Montreal City and District Savings Bank.

That such arbitrators be empowered to make full inquiry, ascertain and report the facts and circumstances in respect of said claim, and their opinion as to what would be a fair and equitable disposition thereof, and what sum, if any, is justly and equitably due and payable by the Dominion government in respect to the said claim.

That, as was provided by section 6 of chapter 6 of the Acts of 1891, in respect of the settlement of disputed accounts between the Dominion and the provinces of Ontario and Quebec, the said arbitrators, in making their award, shall not be bound to decide according to the strict rules of law or evidence, but may decide upon equitable principles.

That any two of the said arbitrators shall have power to make an award, which award shall be made in writing, and the expenses of the said arbitrators, under the said arbitration, shall be in the discretion of the arbitrators.

The Minister, therefore, recommends that it be ordered that the said claim be referred to arbitration as aforesaid, and that the Honourable Sir George Burton, Fletcher B. Wade, Esq., and Edmund J. Barbeau, Esq., be appointed to make such inquiry and report, the said Sir George Burton to be Chairman.

The Committee submit the same for Your Excellency's approval.

JOHN J. McGEE,
Clerk of the Privy Council.

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EXTRACT /from a Report of the Committee of the Honourable the Privy Council, approved by His Excellency on the 5th January, 1901.

On a memorandum dated 4th January, 1901, from the President of the Privy Council recommending that the Order in Council of the 19th July, 1900, concerning the arbitration of claims of the province of Nova Scotia against the Dominion be amended by striking out the following words in the said order, viz. :—

“ And the expenses of the said arbitrators under the said arbitration shall be in the discretion of the arbitrators.”

The Committee submit the same for your Excellency's approval.

JOHN J. McGEE,
Clerk of the Privy Council.

TORONTO, March 11, 1901.

The Minister of Justice, Ottawa.

Re Eastern Extension Railway Arbitration.

Under the instructions of the arbitrators herein, I beg to send you their report in this matter. I am unable at this time to send you a statement of the fees, but will do so in the course of a day or so.

I also send by express the evidence taken in the arbitration and the counsels addresses duly certified.

GEORGE F. BURTON,
Registrar.

To His Excellency the Governor General :—

The arbitrators appointed under an Order in Council of the 19th July, 1900, empowering them to make full inquiry, ascertain and report the facts and circumstances in respect of a claim preferred by the government of the province of Nova Scotia against the government of the Dominion for a refund, with interest, of the bonus advanced by that province on the Eastern Extension Railway, and their opinion as to what would be a fair and equitable disposition thereof and what sum, if any, is justly and equitably due and payable by the Dominion government in respect of the said claim, and that they should not be bound to decide according to the strict rules of law or evidence but upon equitable principles, beg leave to report—

That they held several meetings in the cities of Halifax and Montreal and received such evidence, oral and documentary, as was offered on either side, the province being represented by the Attorney General of the province, Mr. Drysdale, K.C., Mr. Macdonald and part of the time by Mr. Christopher Robinson, K.C., of Ontario, and the Dominion by Mr. Lafleur, K.C.

A claim was made on the opening of the case by several municipalities who had assisted the railway by grants of money to be heard by this Board, but it was determined that such claims did not come within the scope of the reference, and we adhere to that decision.

Upon the province's claim itself, the facts established in evidence before us appear to be briefly these :—

The province was proposing to encourage the building of what is known as the Eastern Extension Railway, running from New Glasgow to the Gut of Canso, by granting a bonus to it, but fearing that they would be unable to secure its completion without aid from the Dominion, negotiations were carried on for a long time between the Dominion and the province, which resulted in the former agreeing to give the Truro Branch to any person or company undertaking to build, which was given legal effect to

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by cap. 46 of the Dominion Act of 1877. That Act, as amended by cap. 12 of the Acts of 1879, and what is known as the Tripartite Agreement, made between the Dominion, the province and the Halifax and Cape Breton Railway and Coal Company, the contractors for building the Extension Railway, constitute the obligation of the Dominion as to the transfer and by which it was provided that the Truro Branch should be retained by the Dominion government until the Eastern Extension Railway to the Gut of Canso and the steam ferry across the Strait should be completed, equipped and established in accordance with the existing contract or any modification thereof that might be agreed to by the company and the Nova Scotia government, to the satisfaction of the Nova Scotia government, and that upon such completion the absolute right of property in the said Pictou Branch should be conveyed to the company on the following terms :—

That the company, after the completion of the road, should efficiently and continuously operate both lines to the satisfaction of the lieutenant governor at a fair and reasonable tariff of charges, which should be made and established by the company, subject to the approval of the government of Nova Scotia, and which should be only altered or amended with the assent and approval of that government, and any difference of opinion as to any item of such tariff should be submitted to the Minister of Public Works of the Dominion as a referee, whose decision should be final and binding.

A clause of forfeiture by the contractors in the event of the contract not being performed to the satisfaction of the provincial government, or in the event of the failure of the company for a period of three months to operate the road efficiently and sufficiently by running at least one passenger train daily, the two lines should become the property of the Nova Scotia Government, and in the event of such forfeiture the roads should be efficiently and sufficiently operated by the Nova Scotia government to the satisfaction of the Governor General in Council at a tariff of charges to be made and established by the Nova Scotia government subject to the approval of the Dominion, with a similar clause of forfeiture to the Dominion in the event of default.

This agreement was confirmed by legislation, and the Truro Branch was to be handed over to the company on completion of the road and ferry to the satisfaction of the Nova Scotia government.

The contractors proceeded to complete the road. Some question at one time existed as to whether the ferry had been completed, but we held during the argument that the steamboat which had been purchased had been recognized by the Dominion and provincial authorities as a sufficient compliance with the contract.

Some dissatisfaction, however, existed in 1882 as to the way in which the work had proceeded, and notice was given to the contractors, in pursuance of which all parties attended before the Commissioner of Public Works, and after some discussion and some intimation of opinion by him, the parties came to an agreement by which upon payment of a certain sum within a limited time, the company agreed to transfer the road and its interest in the Pictou Branch to the province of Nova Scotia.

This time was originally March 1, 1883, and was found to be too short, as legislation was necessary to legalize the transfer and authorize the province to hold and operate the road, and to enable them to do this and to finance for the requisite funds, the time was extended to October 1, 1883. In the uncertainty caused by this, some further negotiations as to the disposal of the two roads to the Dominion occurred, but in view of what subsequently took place, they do not appear to us to be of much importance.

It seems to us to be important to notice that these matters were all within the knowledge of the Dominion government and before the provincial government sent one of the Ministers to London to negotiate a loan, they applied to the Minister of Railways and received unconditional assurances that the Truro Branch would be delivered to the province whenever required or, as it is somewhere expressed, so soon as the arrangements between them and the company were closed.

The matter was also referred to in the House of Commons, when the Minister of Railways used the following words :

'The Committee are aware that under the legislation which has already taken place, the government of Canada agreed to hand over the branch from Truro to Pictou for the

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purpose of securing the construction of the line eastward, and the government of Nova Scotia, with an additional subsidy, secured the construction of the line of railway to the Strait of Canso. Under the existing legislation, the whole of that property is therefore the property of the Eastern Extension Company, but the government of Nova Scotia made a contract with that company, which bound the company, in case the government by a certain time paid them their actual expenditure, to hand over to the government of Nova Scotia the whole property. * * * *

It is expected that in a few days the road from Truro to the Strait of Canso will be in the possession of the government of Nova Scotia, and the government of Nova Scotia are anxious to utilise that for the purpose of securing the extension of the railway system to Sydney and Louisburg in Cape Breton.'

Relying upon these assurances, the Nova Scotia Minister proceeded to London, where, with some difficulty, he succeeded in raising the required funds at a large rate of interest, and in the month of August 1883, wrote to the Ottawa authorities that they hoped to be in a position at latest by the 1st October to take over the Truro Branch.

No intimation was then given that the assurances previously made were not still in full force.

On the 10th September the provincial government, becoming somewhat alarmed, wrote referring to the previous assurances and to the serious consequences which might ensue and requesting them to arrange at once for the transfer, and the engineer of the company was despatched to Ottawa to urge immediate action.

But it is not without significance that no reply was sent to these applications until the 1st October, the very day fixed for the closing of the transaction between the company and the province, and the payment of the money. That reply, which was received a few days subsequently, merely stated that the special provisions of the statutes and the Tripartite Agreement applied only to circumstances which were in no way similar to those then existing.

A deputation from the Nova Scotia government was at once despatched to Ottawa, but was unable to obtain any official information until the 20th October, when the Order in Council of that date was handed to them.

Had this been done at an earlier date, an attempt might have been made to secure some modification of the conditions imposed by that order, or failing that, the province might have received back from the company the half million dollars paid and saved further payment made on the 1st October.

As we understand, the first objection as to the altered circumstances, it is claimed, we believe, that the province is not in possession under any of the clauses of the Tripartite Agreement, but simply as purchasers from the company. It is not a very meritorious objection and we think it is not entitled to prevail. The province was claiming that default had been made in the agreement, which might or might not have entitled them to forfeit the contract, but it was made the subject of a compromise under which the company agreed to transfer their right to the province. Whatever may be the strict construction of the Tripartite Agreement, the Dominion with a full knowledge of all the facts have treated their possession as rightful, and we think they should not be allowed 'in foro conscientiae' to say that they are in possession simply and necessarily distinctly as purchasers. We therefore overrule this objection.

We come now to the Order in Council of October 20.

It treats the road and ferry as not having been completed—the objection we have already dealt with. It then imposes two conditions which we have no hesitation in saying were unwarranted under the Acts of Parliament and wholly illegal. The first of these was in requiring a tariff of rates upon a mileage basis framed on the Intercolonial tariff, and secondly also, as a condition precedent, that the province should furnish a specified quantity of rolling stock.

It is perfectly clear that under the statutes and the Tripartite Agreement the tariff was to be prepared by the province subject only to the approval of the Dominion authorities.

It must be assumed in a large, we may say, national matter of this description that all parties would intend to act in good faith, but to guard against possible misconduct

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or mistake and to prevent a dead lock, the government of the Dominion should have power to revise it, but that the province was to be the initiating party and for a very obvious reason is, we think, clear.

In the same way it appears to us to be clear that the requiring them to comply with the demand for rolling stock was not warranted. The province, when commencing to operate the road, would not have been in default authorizing the Dominion to forfeit unless they failed to operate it for a period of three months efficiently and sufficiently, such sufficiency being specially defined in the agreement. To exact an equipment admittedly far larger than the then existing state of the traffic was so manifest a departure from the spirit of the agreement as to operating as to demonstrate, we think, very clearly that they could not treat the failure to procure that amount of equipment in advance of their taking over and operating the line as a ground of forfeiture.

Whilst a continuous default for three months would be necessary after they commenced to operate, a refusal or neglect for ever so short a period to comply with the demand made upon them to provide the rolling stock is claimed to be a ground of forfeiture—it requires only to be mentioned to show its unreasonable character.

If this reference had been granted immediately after the issue of the Order in Council of the 20th October, could there be a doubt as to the right of the province to recover damages from the Dominion for a breach of their agreement? Those damages would have been necessarily of a somewhat speculative and uncertain nature, but it would appear to be conceded on all hands that the value of these two properties in the hands of the Dominion very largely exceeded the sum paid for them and also that they are very valuable and limiting the amount of those damages to the amount of the refund would strike one as a reasonable and politic concession on both sides to avoid a prolonged and expensive inquiry as to the amount of the damages, if the province is entitled to anything at all.

It is in the first place contended on the part of the Dominion that the settlement of 1884 was made deliberately and voluntarily by the government of the province. On that point, we beg to express the opinion that if one party to a contract has the power of saying to the other 'that which you require shall not be done except on the conditions which I choose to impose,' the parties cannot be said to stand on an equal footing and the defence of duress applies. But it was replied by Mr. Lafleur with great force, 'What becomes of such a charge is the party under the alleged duress did precisely the same thing which it had spontaneously offered to do long before any pretense of compulsion could have existed?'

He relied chiefly in support of this on a letter of January 31, 1883, but it seems to us that that hardly supports his contention, inasmuch as it contained a condition binding the Dominion government to extend the road through Cape Breton and assume the operating of the whole.

Two previous offers differed from that ultimately agreed on, as the Dominion was in one case to hold the lines upon trust for the province and in the other was to hold them subject to the right of redemption, but in addition to this the then position of the province must be borne in mind, as they required legislation to enable them to carry out the proposed arrangement with the company and to raise the requisite funds and the time for closing that arrangement had nearly arrived.

We have not critically examined the other offers because for reasons which we shall presently refer to, these objections cannot in this case be successfully urged.

The other objection which would be fatal in an ordinary case between individuals may probably not apply in cases where the litigants are a government or corporation who stand in a representative or fiduciary position to others such as the general body of ratepayers of a province or municipality; but in this case we think those parties cannot be prejudiced by the laches of the government inasmuch as the conditions imposed by them as conditions precedent to the transfer were not only as we have endeavoured to show unreasonable but wholly illegal.

If therefore we were right in assuming that if this reference had been made at an earlier date, the province must have been entitled to recover, has anything occurred since to deprive them of that right? for the reasons given, we think not.

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We quite agree with the very able argument of Mr. Lafleur, that this is not a case in which, after the great delay and what has since occurred, the contract can be rescinded or that we can add a term to the contract, but that is not what is sought. The contention is that the Dominion broke its contract by imposing conditions that were illegal and that the province ought not to be deprived of its rights by this illegal act of the then government, which it would have been idle to ask them to redress.

But there is evidence which would warrant us in concluding that these conditions which were contained in the Order in Council of the 20th October were not the true reasons for adopting the course then taken. A very short time previously, the Minister of Railways, when the province was about to raise funds to pay for the railway, gave the provincial authorities the most unqualified assurance that the Truro Branch would be handed over, and yet we find the same Minister, when the time had arrived for fulfilment of the promise, stating in parliament that the government had made up their minds that this road should not be disposed of. The true reason would rather seem to be that which was stated by the same Minister of Railways in his place in parliament, who after referring to its vast importance to the coal mining industries and its important connection with the transport of coal and the coaling of steamers at the port of Halifax and from a variety of causes stated, it was found that it would be attended with great inconvenience and disadvantage, and that in fact parting with it would to a large extent dislocate the railway system as it had been carried on, and in another place he said it was the key of the Intercolonial situation, being the entrance to the coal fields, adding 'We have a splendid thing and it would be absolutely impossible for us to give it away.'

It no doubt was a reasonable thing if this road had become a national necessity as part of the general railway system to get rid of this previous engagement but not at the expense of the province, and sitting here under the large powers with which we are invested to deal with the claim upon broad and equitable grounds, we are forced to the conclusion that the claim of the province is a just one, and we respectfully recommend that they should be paid the sum of \$671,836, the amount of the bonus.

As to the interest claimed, there are many reasons why it should not in our opinion be allowed. It was not claimed for many years, and although claims were made by the province from time to time, they were made on different grounds and for altogether different matters or, as is sometimes said, for better terms. The present arrangement having resulted favourably in the profitable working of the roads benefiting the province as well as the Dominion, we think the ends of justice will be satisfied by allowing the claim without interest.

The reference does not empower us to deal with the costs, and we therefore make no recommendation as to them.

We trust that this payment will have the effect of removing a grievance which has rankled in the minds of the people of Nova Scotia for many years, and we cannot say without some reason.

GEO. W. BURTON,
FLETCHER B. WADE,
E. J. BARBEAU,

Arbitrators in the above matter.

8th March, 1901.